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ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN REFUSING TO GIVE SHAW A CREDIT FOR SMITH'S RECEIPT OF UIM BENEFITS BECAUSE THE UIM BENEFITS DID NOT CONSTITUTE A COLLATERAL SOURCE PAYMENT IN THAT SMITH DID NOT INCUR ANY EXPENSE, OBLIGATION OR LIABILITY IN SECURING THE POLICY WHICH PAID HIM THE UIM BENEFITS.

A. Shaw properly preserved this Point for appeal and, furthermore, this entire appeal is properly before the Court.

Smith's contention that Shaw abandoned his credit/set-off argument by failing to resurrect the argument in his Motion to Amend Judgment is baseless. Shaw raised the issue with the trial court prior to the entry of the June 2, 2003 judgment, and although that judgment later became a nullity,[1] the trial court had already effectively ruled on the issue when Shaw filed his motion to amend the judgment.

Since Shaw had already presented the issue to the trial court in his Motion for Credit Against Verdict, (L.F. 13-18), he saw no need to raise the issue again in his motion to amend the judgment. That's why in his motion to amend, Shaw suggested that the court

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[1] A vacated judgment results in destruction of the judgment in its entirety, and the situation is the same as though the judgment had never been made. Buchanan v. Cabiness, 245 S.W.2d 868, 873 (Mo.banc 1951); Krummel v. Hintz, 222 S.W.2d 574, 578 (Mo.App. 1949).

issue an amended judgment for the total sum of $175,000, which figure would represent the amount of the verdict ($200,000) minus the undisputed $25,000 credit due Shaw for Smith's settlement with Joshua Stark.

Given all the above, Shaw's request that the trial court enter an amended judgment for $175,000 hardly falls under the category of "invited error." A party is not estopped to complain of error under the rule of invited error unless it appears from the record that the court was led or induced by him to commit the error. Shaffer v. Sunray Mid-Continent Oil Company, 336 S.W.2d 102, 108 (Mo. 1960). Since Shaw had already raised and the parties had already fully briefed the issue to the trial court, it would have been futile for Shaw to raise the issue again, since he already knew how the court would rule.[2]

Finally, notwithstanding Smith's rather oblique contention to the contrary, this Court does have jurisdiction to hear this appeal. Although Smith suggests that "this Court should sua sponte consider whether there was jurisdiction for the Western District to hear Appellant's appeal and whether the trial court could enter a 'new' judgment on September 17, 2003," he fails to specify why the Western District may have lacked jurisdiction to hear Shaw's appeal. (See Smith's Substitute Brief at p. 3). Apparently, Smith is suggesting either

[2] Indeed, Smith was quick to point out in opposing Shaw's motion to set aside the June 2, 2003 judgment that the "parties briefed the underinsurance issue" and that the trial court "correctly ruled that [Shaw] did not get a credit for underinsurance payment." [S.L.F. 48].

that the trial court lacked jurisdiction to set aside the June 2, 2003 judgment or that the trial court erred in doing so.

Whichever the case, neither of these points is before the Court, since Smith didn't file a cross-appeal. Moreover, even if Smith had properly put these issues before the Court, he'd lose on them anyway. Although more than thirty days had elapsed since the entry of the June 2, 2003 judgment, the trial court still had jurisdiction to hear Shaw's motion to set aside under Rules 74.03 and 74.06.

Further, trial courts are vested with broad discretion in acting on motions to vacate judgment, and the appellate court will not interfere with the exercise of such discretion unless the record convincingly demonstrates an abuse of discretion. State ex rel. Johnston v. Luckenbill, 975 S.W.2d 255, 256 (Mo.App.W.D. 1998). Here, the record is clear that the trial court did not abuse its discretion in granting Shaw's motion to set aside because Shaw never received notice of the judgment. (S.L.F. 36-46).

B. The UIM payment Smith received was not collateral source, and unless Shaw is given credit for that payment, Smith will have received the windfall of a double recovery, which is a species of unjust enrichment.

Although Smith contends that his "trust agreement" with Farmers and the Farmers insurance policy both establish that he incurred an obligation or liability when he received Farmers' UIM payment, the record shows otherwise. Neither Smith's "trust agreement" with Farmers nor the Farmers insurance policy is properly before this Court, because neither document is part of the record on appeal.[3] Further, even if those items were part of the record, Smith still could not prove he incurred an obligation or liability in connection with his receipt of UIM benefits from Farmers, since the "trust agreement" nowhere states that Smith promises to hold other funds he receives in trust for Farmers[4], and Smith was not a contracting party to the insurance policy.

As the Western District observed in Duckett v. Troester, 996 S.W.2d 641, 648 (Mo.App.W.D. 1999), the justification for the collateral source rule is that "the wrongdoer should not benefit from the expenditures made by the injured party in procuring the insurance coverage." The collateral source rule has no application if the plaintiff incurred no expense, obligation or liability in securing the insurance coverage in question. Id.

Here, the record shows not only that Smith paid nothing for the UIM benefits he received from Farmers but also that he incurred no obligation or liability of any kind in connection with his receipt of those benefits. Indeed, although after the verdict in this case

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[3] Shaw has filed a motion to strike these items from Respondent's Appendix.

[4] See Appendix to Smith's Substitute Brief, A-47.

Geico made an involuntary payment to Smith of more than $25,000, there's nothing in the record to suggest that Smith ever gave any of these funds to Farmers.

It is this latter fact that raises another important policy consideration, namely, the principle of double recovery. Generally, a person who has sustained loss or injury may receive no more than just compensation for the loss or injury sustained. Weeks-Maxwell Const. Co. v. Belger Cartage Serv., 409 S.W.2d 793, 796 (Mo.App. 1966). He is not entitled to be made more than whole, and he may not recover from all sources an amount in excess of the damages sustained, or be put in a better position than he would have been had the wrong not been committed. Id. While entitled to be made whole by one compensatory damage award, a party may not receive the windfall of a double recovery, which is a species of unjust enrichment and is governed by principles of preventive justice. R.J.S. Sec., Inc. v. Command Sec. Services, 101 S.W.3d 1, 17 (Mo.App.W.D. 2003). Subrogation exists to prevent unjust enrichment. Keisker v. Farmer, 90 S.W.3d 71, 75 (Mo.banc 2002).

Based on the record in this case, Farmers has no subrogation rights as to any part of Smith's judgment against Shaw. Since Smith cannot be legally compelled to repay Farmers any part of his judgment against Shaw, Smith stands to make a windfall of $25,000 in this case, unless Shaw receives an additional credit in that amount.

C. Shaw's entitlement to a credit for Smith's receipt of UIM benefits was

properly a post-trial matter and not an evidentiary matter.

In his Answer, Shaw asserted in his First Defense that he was "entitled to a credit and/or set-off for any other settlements into which plaintiff has entered arising out of the accident that is the subject of the plaintiff's Petition for Damages." (L.F. 8). Shaw asserted this affirmative defense in accordance with Norman v. Wright, 100 S.W.3d 783, 785 (Mo.banc 2003), and in doing so, he was basically asserting that he was entitled to receive a partial satisfaction against any judgment Smith might recover against him. A motion for set off and credit against jury verdict for an amount of settlement by other defendants prior to trial is a statutory post-judgment motion for satisfaction of judgment. Julien v. St. Louis University, 10 S.W.3d 150 (Mo.App.E.D. 1999).[5]

Despite the above, Smith asserts Shaw has no grounds for appeal in that Shaw never attempted to introduce evidence of Smith's settlement with Farmers at trial. "The collateral source rule," contends Smith, "is an evidentiary rule, which relates not to reducing a judgment but whether evidence of mitigating damages is admissible and can be considered by the jury or fact-finder." (Smith's Substitute Brief, p. 30, emphasis in original).

Smith's contention is wrong because it ignores the actual and larger issue, which is

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[5] Courts have general power to control their own judgments, and in that connection they may order entry of either complete or partial satisfaction of a judgment on which payment has been made. Brosnahan v. Brosnahan, 516 S.W.2d 812 (Mo.App. 1974).

whether Shaw is entitled to receive a credit or set off against the judgment for Smith's receipt of UIM benefits. Just because there's a question about whether the UIM benefits are collateral source doesn't mean the matter shifts from being a post-trial one to an evidentiary one. Moreover, although UIM benefits are contractual in nature, they operate in part as a liability insurance surrogate such that a tortfeasor's request for credit of UIM benefits received by a plaintiff is properly presented by post-trial motion and not as an evidentiary matter. See Haynes v. Yale-New Haven Hospital, 699 A.2d 964 (Conn. 1997).[6]

D. Ruling in Shaw's favor will not raise the issue of whether an insured's spouse or child is entitled to the benefit of the collateral source rule.

According to Smith, if this Court does not affirm the trial court's decision, "cases will surely be decided next on whether a spouse or child who did not ACTUALLY pay the premium for the insurance policy will be entitled to the benefit of the "collateral source" rule. (Smith's Substitute Brief, p. 27).

Smith's dire prediction ignores the fact that the head of a household who buys an automobile insurance policy pays premiums on behalf of not only himself but also his

[6] Since UIM benefits are contractual and also depend on principles of tort liability and damages, whether in any particular case they should be treated as are other types of insurance must depend on a case-by-case analysis of the underlying purpose and principles that apply to such benefits. Haynes, 699 A.2d at 968.

spouse and children. A "named insured" pays insurance premiums on behalf of himself and his "resident relatives" but not on behalf of those who are not "resident relatives."

Because there is no evidence in the record that Smith was a "resident relative" of whoever purchased the Farmers policy under which he received UIM benefits, the premium payments for that policy cannot be deemed to have been made on Smith's behalf. Therefore, Smith cannot be considered as having incurred any "expense" in connection with his receipt of UIM benefits.

To summarize, Shaw duly preserved his point of error as to the UIM-credit issue, and he properly raised it with the trial court by post-trial motion. Smith's receipt of UIM benefits in this case was not collateral source, and unless Shaw receives a credit for Smith's receipt of UIM benefits, Smith will receive a double recovery in contravention of Missouri law.

The trial court therefore erred in overruling Shaw's request that he receive a credit against the judgment for Smith's receipt of UIM benefits.

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN OVERRULING SHAW'S MOTION TO AMEND JUDGMENT BECAUSE SMITH WAS NOT ENTITLED TO AN AWARD OF PREJUDGMENT INTEREST UNDER SECTION 408.040.2, RSMo 2000 IN THAT SMITH'S OFFER TO SETTLE WAS NOT MADE IN A TORT ACTION; SMITH'S OFFER TO SETTLE WAS NOT LEFT OPEN FOR SIXTY DAYS; AND THE TRIAL COURT'S APPLICATION OF SECTION 408.040.2 DEPRIVED SHAW OF HIS CONSTITUTIONALLY PROTECTED DUE PROCESS OF LAW RIGHTS BECAUSE SHAW WAS GIVEN NEITHER NOTICE NOR AN OPPORTUNITY TO CONTEST SMITH'S DELAY IN PROSECUTING HIS CASE.

A. Shaw properly preserved this Point for appeal.

Contrary to Smith's assertion, Shaw did not induce the trial court's error of including an award of prejudgment interest in the judgment. Before the judgment was ever entered, Shaw duly advised the trial court he didn't think an award of prejudgment interest would be proper and that he intended to ask the court to completely eliminate it. (S.L.F. 55-56).

Further, Shaw's submission of a proposed judgment to the trial court as an attachment to his Motion for Credit didn't invite error because it was already assumed that the judgment would include an award of prejudgment interest, and the only issue for the court's consideration at that time was whether Shaw deserved a credit for Smith's receipt of

UIM benefits. In any event, the circumstances surrounding the entry of the June 2, 2003 judgment are now moot, as that judgment was vacated and became a nullity. See fn.1, supra.

Smith also contends Shaw should not be able to appeal Point II because Geico partially satisfied the judgment by paying its applicable policy limit and the prejudgment and post-judgment interest on that limit. But Geico's payment was involuntary because it was made in anticipation of Smith's equitable garnishment action and to cut off the accrual of interest on part of the judgment. See, e.g., Kinser v. Elkadi, 654 S.W.2d 901 (Mo.banc 1983); Two Pershing Square L.P. v. Boley, 981 S.W.2d 635 (Mo.App.W.D. 1998) and Countryman v. Seymour R-II School Dist., 823 S.W.2d 515 (Mo.App.S.D. 1992).[7]

Finally, to the extent Smith argues Shaw impliedly admitted all of the petition's allegations concerning prejudgment interest, the argument is baseless. The only allegation from paragraph 9 of the petition that Shaw expressly admitted was that Smith sent a certified letter to Shaw's insurance company on or about 7/14/00. (L.F. 4-5; 9). Shaw stated in his Third Defense that "[a]ny and all allegations, statements of law or conclusions of fact set forth in plaintiff's Petition for Damages that are not specifically admitted are hereby expressly denied," (L.F.8), and Shaw's answer in this regard satisfied the requirements of

[7] Smith filed an equitable garnishment action on July 15, 2003, styled *Joshua Smith v. Geico General Insurance Company and Charles G. Shaw*, Case No. CV403-432CC, Circuit Court of Johnson County, Missouri.

Rule 55.09. Boyd v. Margolin, 421 S.W.2d 761, 767 (Mo. 1967).

B. The proper standard of review on Point II is *de novo*.

The proper standard of review on Point II is not abuse of discretion, as Smith asserts. It is *de novo*.

The meaning of *in tort actions* as used in section 408.040.2, and whether or not the trial court's application of section 408.040.2 deprived Shaw of due process, are questions of law and as such are reserved for the independent judgment of the reviewing court. Laborers' Dist. Council v. St. Louis, 5 S.W.3d 600 (Mo.App.E.D. 1999) (statute interpretation is a question of law reserved for the independent judgment of the reviewing court) and Buchholz Mortuaries v. Director of Revenue, 113 S.W.3d 192 (Mo.banc 2003) (questions of law are for the Supreme Court's independent judgment).[8]

C. Smith's argument regarding the meaning of *in tort actions* completely disregards axiomatic statutory construction principles and the public policies

[8] Perhaps Shaw's motion to amend judgment more properly should be treated as a motion for new trial, since it claims that the trial court committed an error of law in awarding Smith prejudgment interest. Taylor v. United Parcel Service, Inc., 854 S.W.2d 390 (Mo.banc 1993) (motion to reconsider, despite its odd style, placed before the trial court allegations of error and was appropriately treated as motion for new trial).

served by section 408.040.2.

Predictably, Smith asserts that *in tort actions* merely refers to the type of case in which a party can obtain prejudgment interest rather than frames, time-wise, the point at which a party triggers his entitlement to prejudgment interest. Just as predictably, Smith cannot point to any case law that supports his interpretation of the language, other than Lester v. Sayles, which doesn't even address the phrase *in tort actions*.

Rather than attempting to refute Shaw's analysis of *in tort actions* using this Court's well-established statutory construction principles, Smith argues that Shaw's analysis ignores section 408.040.2's use of the words *claimant* and *claim.* But Smith's argument is unavailing, because *claimant* and *claim* as used in the statute logically refer to any classification of a *party*[9] who may assert a tort claim, such as a plaintiff, counter-claimant, cross-claimant, or third-party plaintiff. Moreover, *claim* is commonly used in Missouri to refer to a party's asserted right to payment (of some other form of relief) in the context of a lawsuit. See, e.g., Cantrell v. City of Caruthersville, 221 S.W.2d 471 (Mo. 1949) and Rules 55.05, 55.06, 55.27 and Rule 55.32.

Smith also posits that because section 408.040.2 "is addressing when prejudgment

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[9] *Party* is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought. BLACK'S LAW DICTIONARY 1010 (5th Ed. 1979).

interest can be awarded as part of a judgment, the legislature obviously had to refer to tort actions because it is only in a lawsuit that a judgment is awarded." Smith's Substitute Brief, p. 36-37. But this argument is self-defeating and actually supports Shaw's analysis. Since by definition interest can be awarded only in the context of a lawsuit, *in tort actions* must frame, time-wise, the commencement of the statute because to read the phrase as Smith suggests would make it superfluous.[10]

Smith's next argument, about the Task Force's reference to "or his counsel if suit has been filed," is likewise untenable. When considered in the context of the Task Force's expressed desire that a defendant have a meaningful opportunity to evaluate a settlement demand, the Task Force must have assumed in making the reference that there'd be full disclosure of information between the parties.

Additionally, and contrary to Smith's assertion, Shaw doesn't "rely heavily" on the Task Force report to demonstrate the meaning of *in tort actions*. Rather, Shaw refers to the report only to corroborate the conclusion he reaches after applying the basic tenets of statutory construction to determine the phrase's meaning.

In his opening brief, Shaw explained how giving *in tort actions* its plain, ordinary and

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[10] Cf. section 408.020, the prejudgment interest statute for contract and account cases. The legislature did not use the word *action* there to describe the context in which a party can recover prejudgment interest, since it is only in a lawsuit that interest can be recovered.

unequivocal meaning would effectuate the legislative purpose behind section 408.040.2. Shaw then pointed to the Task Force report as indicative of the public policies behind the statute, which, according to the Task Force, are to fully compensate tort victims and to speed the litigation process by encouraging settlement. Since submitting his opening brief, Shaw found that this Court and two of our three appellate circuits have already recognized the two public policies expressed by the Task Force. See Brown v. Donham, 900 S.W.2d 630 (Mo.banc 1993), Bowan v. Express Medical Transporters, 135 S.W.3d 452 (Mo.App.E.D. 2004), and Larabee v. Washington, 793 S.W.2d 357 (Mo.App.W.D. 1990).

Given the recognized public policies behind section 408.040.2, the analysis of *in tort actions* comes full circle and returns to this basic tenet: When interpreting statutes, the court must strive to implement the policy of the legislature and harmonize all provisions of the statute. Larabee, 793 S.W.2d at 361 [citing 20th & Main Redevelopment Partnership v. Kelley, 774 S.W.2d 139 (Mo.banc 1989)]. The purpose of the statute must be considered and the court must presume the legislature intended a logical result. Id.

As Shaw noted in his opening brief, encouraging defendants in tort cases to evaluate their cases sooner and giving defendants a meaningful opportunity and adequate amount of time to evaluate a demand necessarily go hand-in-hand. The policy of encouraging settlements can hardly be served unless the defendant actually has the opportunity to

evaluate a settlement offer.

If the legislature didn't care whether a party had a meaningful opportunity to evaluate a settlement offer, it could have just provided that prejudgment interest begins to run on the date of injury, as some other states have.[11] But it didn't do that. Instead, the legislature saw fit to give parties a time frame -- sixty days -- within which to evaluate settlement offers and to decide whether the benefit of accepting an offer outweighed the costs & risks of rejecting it and continuing with litigation.

Reading section 408.040.2 as Smith suggests produces an illogical result and fails to implement the policy behind the statute because it fails to give a party the means necessary to compel production of information which the party may need to fully and fairly evaluate a settlement offer. What happened in this case proves the point. Here, Shaw never had any opportunity to evaluate Smith's settlement offer because the offer was made before Smith filed suit, Smith never gave Shaw any information supporting the offer before it expired, and Shaw had no way to compel Smith to produce supporting information.

To further appreciate the illogic of Smith's position, compare the consequences surrounding a pre-suit settlement offer given with no supporting information to the consequences surrounding a post-suit settlement offer given with no supporting

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[11] See, e.g., Grove by and through Grove v. Myers, 382 S.E.2d 536 (W.Va. 1989) and Sherbahn v. Kerkove, 987 P.2d 195 (Alaska 1999).

information. In the post-suit situation, the party receiving the offer can utilize the discovery process to gather the information he needs to evaluate and respond to the offer before it expires, and if the other party resists, he can ask the court to strike the claim for prejudgment interest.

In the pre-suit situation, however, the party receiving the offer does not have the discovery process available to him and therefore cannot seek relief from the court for the other party's failure or refusal to provide supporting information. In addition, the receiving party in the pre-suit situation doesn't have the option of utilizing the court's subpoena power to obtain records which are often difficult or impossible to get because of various privacy laws.

It is only by giving *in tort actions* its plain, ordinary and unequivocal meaning that the provisions of section 408.040.2 can be harmonized and the legislative policy of encouraging settlements can be implemented. In sum, section 408.040.2 requires that a party make his offer of settlement or demand for payment during a pending lawsuit, so that even if the offeror fails to give the offeree information supporting the offer, the offeree nonetheless will have the means to obtain such information.[12]

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[12] The references to "offeror" and "offeree" are intentional because once section 408.040.2's provisions are harmonized, the words *claim* & *claimant* and *party* & *parties* are understood as references to claims for recovery in tort brought by or against plaintiffs,

Since Smith failed to make a settlement offer in this tort action, he never triggered the statute and was not entitled to recover prejudgment interest. Accordingly, the trial court erred in failing to eliminate the award of prejudgment interest.

D. Giving *in tort actions* its plain, ordinary and unequivocal meaning will not foster more litigation.

According to Smith, reading section 408.040.2 to require parties to make post-suit settlement offers to trigger prejudgment interest "would encourage and mandate more and more lawsuits." (Smith's Substitute Brief, p. 37-38). "Every injured person in every claim," Smith argues, "would have to hire an attorney and actually file a civil lawsuit and then make a written offer of settlement to trigger a right to prejudgment interest." Id.

Smith's argument is absurd. It assumes that the chief (if not only) reason injured persons hire attorneys is to send settlement offer or demand letters primarily for the purpose of securing awards of prejudgment interest. But most injured persons and their attorneys send settlement demand packages (not just one-paragraph offers or demands as was done in this case, but packages) in hopes of *avoiding* litigation, not with the intent of

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defendants, or third-parties.

engaging in it.

To suggest that giving section 408.040.2 its intended meaning would create a paradigm shift for those attorneys who routinely make good-faith and sincere attempts to settle their injury cases without resorting to litigation is preposterous. The fact is, most such attorneys give no thought to securing prejudgment interest because their chief objective in sending pre-suit demand letters is to actually settle the case, not to litigate it.

Frankly, Smith's argument about fostering more lawsuits does not even belong in a discussion of section 408.040.2. As this Court observed in Brown v. Donham, supra, one of the policies served by the statute is "where liability and damages are fairly certain, to promote settlement and to deter unfair benefit from the delay of litigation." Id. at 633. Since pre-suit claims cannot suffer from a "delay in litigation," the policy of promoting the settlement of claims "to deter unfair benefit from the delay of litigation" does not even apply to pre-suit claims.

Indeed, in accordance with Brown, section 408.040.2 must be read as applying only to claims that are already in litigation, because one of the two policies of the statute is "to promote settlement . . . of litigation." At bottom, the legislature clearly contemplated that section 408.040.2 can be triggered only as to those claims that are already in litigation.

E. Even if the Court reads section 408.040.2 as not requiring a party to

make a settlement offer during a pending tort action, Shaw should not be foreclosed from arguing on appeal that Smith failed to leave his offer open for sixty days.

As previously discussed herein, Shaw did not impliedly admit all of the petition's allegations regarding prejudgment interest. (See, supra, p. 15-16). Rather, Shaw admitted only that Smith sent a certified letter to Shaw's insurance carrier on or about July 14, 2000. (L.F. 9).

Thus, Shaw should not be foreclosed from arguing on appeal that Smith failed to leave his settlement offer open for at least 60 days, even if Shaw did not raise this specific argument with the trial court. In his motion to amend, Shaw did argue generally that Smith failed to satisfy section 408.040.2's requirements.

Moreover, even assuming Shaw failed to adequately raise an argument regarding the length of time Smith left his settlement offer open, this Court still should consider the argument under the plain error doctrine. This Court, in its discretion, can consider plain error affecting substantial rights if the court determines that manifest injustice or miscarriage of justice would otherwise result. See Guier v. Guier, 918 S.W.2d 940 (Mo.App.W.D. 1996).

It cannot be disputed that Smith's settlement offer clearly failed to satisfy section 408.040.2's mandate that an offer be left open for 60 days. The record is clear. Smith

made his settlement offer by letter dated July 14, 2000. (L.F.38). The letter itself said the offer was "open for sixty (60) days from the date of this letter." Id. Even if Smith is correct that it doesn't matter whether the time begins with mailing or with receipt, so long as the offer actually remains open for 60 days, Smith still failed to satisfy the sixty-day requirement because he told Geico in his September 15, 2000 letter that "the settlement deadline given in my letter of July 14, 2000 has now expired." (L.F.39). Since Geico wasn't actually given 60 days from when it received Smith's offer to evaluate the offer, Smith's offer failed to satisfy section 408.040.2's requirements.

For this reason alone, the trial court erred in failing to eliminate the award of prejudgment interest from the judgment.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's rulings on Shaw's Motion for Credit Against Verdict and Motion to Amend Judgment, and it should remand the case to the trial court with instructions that the judgment be modified to reflect an additional credit to Shaw of $25,000 and to show a total judgment against Shaw in the amount of $150,000.

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RULE 84.06(c) CERTIFICATE

Pursuant to Mo.R.Civ.P. 84.06(c), counsel for Appellant certifies that this brief complies with the limitations in Rule 84.06(b) and that the brief contains 4,949 words. In addition, counsel for Appellant certifies that the disk containing Appellant's Substitute Reply Brief has been scanned for viruses and is virus-free.

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